(1) 95-451

Supreme Court, U.S.
FILED
SEP 12 1995
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In The

Supreme Court of The United States

October Term, 1995

ROBERT L. SCHULZ, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and SALVATORE J. GRENCI,

Petitioners,

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT NEW YORK DEMOCRATIC STATE COMMITTEE, AND FRIENDS OF MARIO M. CUOMO, COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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58 pp

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QUESTION PRESENTED

Whether, in violation of the second clause of the Fourteenth Amendment to the United States Constitution, New York State Education Law 2037 abridges privileges and immunities of petitioners as citizens of the United States, including the right to a "separation of powers" and to a "republican form of government."

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case except that George Pataki is now the Governor; Joseph Bruno is now the Majority Leader of the Senate, Sheldon Silver is now the Speaker of the Assembly, Charles A. Gargano is now the Commissioner of the Department of Economic Development, and Richard Mills is the Commissioner of the State Education Department.

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OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A, at pages A-1 to A-13), is reported at 86 NY2d ___, decided June 14, 1995.

The memorandum and order of the Appellate Division, Third Department (Appendix B, at pages A-14 to A-18) is reported at 205 AD2d 912.

The decision and order of the Supreme Court, Albany County (Appendix C, at pages A-19 to A-32) is unreported.

JURISDICTION

The opinion and order of the New York Court of Appeals was entered on June 14, 1995.

In accordance with Rule 13.4 of this Court, this petition is filed within 90 days of the date of the opinion and order of the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment (Clause 2) to the United States Constitution provides, in relevant part: *"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."*

2. An implicit constitutional (structural) safeguard is "separated powers" among the legislative, executive and judicial branches.

3. New York Education Law Section 2037 reads: *"All disputes concerning the validity of any district meeting or election or any of the facts of the officers of such meeting or election shall be referred to the Commissioner of Education for determination* [Clause 1] *and his decisions in the matter shall be final and not subject to review* [Clause 2]." (Matter in brackets is petitioners'.)

4. Article IV, Section 4 of the United States Constitution reads in relevant part: *"The United States shall guarantee to every citizen in this Union a republican form of government."*

5. Article VI, Section 7.a of the New York Constitution reads in relevant part: *"The Supreme Court shall have general original jurisdiction in law and equity...."*

6. Article VII, Section 8 of the New York Constitution reads in part: *"The money of the state shall not be given or loaned to or in aid of any private corporation, or private undertaking...."*

7. Article VIII, Section 1 of the New York Constitution reads in part: *"No county, city, town or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking...."*

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In 1992 plaintiffs filed two claims in the Supreme Court of New York State against public officials for using public funds to print and distribute literature which was designed to sway the results of elections, in violation of the "no public money for private purposes" provisions of the New York Constitution (Article VIII, Section 1, Clause 1 and Article VII, Section 8, Clause 1).

The first claim was against Governor Cuomo and one of his commissioners -- Vincent Tese, Commissioner of the State Department of Economic Development -- for using public funds to print and mail 50,000 copies of a newsletter which was designed to entice more votes for Bill Clinton and less votes for George Bush in the 1992 presidential election. The only evidence plaintiffs needed to present to the Court was the newsletter. It spoke for itself. The fact that defendants prepared it and distributed it at taxpayer's expense was uncontroverted. On June 14, 1995 the New York State Court of Appeals, reversing two lower court decisions, found in favor of

plaintiffs, finding the newsletter to be violative of plaintiffs rights under the "no public money for private purposes" provision of the New York Constitution (Article VII, Section 8, Clause 1). Appendix A hereto is a copy of the court's opinion.

The second claim was against the Board of Education of the Commack Central School District and the New York State Education Department for using state and local funds to print and mail a newsletter to every household in the school district, which newsletter was designed to entice more votes for a proposition to contract indebtedness and less votes against the proposition. ***The only evidence plaintiffs needed to present to the Court was the newsletter. It spoke for itself.*** The fact that defendants prepared and mailed it was undenied and undeniable. The facts were uncontroverted. There was no need for any evidentiary hearing. On June 14, 1995, the New York State Court of Appeals, affirming two lower court decisions, dismissed the petition for lack of court jurisdiction. The Court ruled that in Education Law 2037 the Legislature had given the Commissioner of the State Education Department ***original jurisdiction*** in all matters of law and equity involving alleged wrongdoing by school district officials, even if the officials were being charged with violating individual, constitutional rights. Appendix A is a copy of the decision by the Court of Appeals.

In their arguments under the claim against the Commack defendants, plaintiffs had objected to the jurisdictional defense, on constitutional grounds. Defendants had moved to dismiss for lack of jurisdiction, citing Education Law 2037. Plaintiffs replied that if Education Law 2037 had the meaning defendants were claiming it had, then Education Law 2037 was, itself, unconstitutional as violative of the "separate powers" doctrine, as expressed in Article VI, Section 7.a of the

New York Constitution, which plainly states that the Supreme Court (not the Commissioner of Education) has ***original jurisdiction*** in all matters of law and equity.

Supreme Court had dismissed the complaint for lack of jurisdiction, citing Education Law Section 2037. Both appeals courts affirmed, without commenting on, much less deciding, the "separate powers" argument and the constitutionality of Education Law 2037.

On June 14, 1995, the New York Court of Appeals ruled that it had no jurisdiction over the matter. The Court held: *"Under Education Law 2037, exclusive jurisdiction to determine that claim resided in the State Commissioner of Education."*

Education Law 2037 reads in relevant part:

"*All disputes concerning the validity of any district meeting or election or any of the acts of the officers of such meeting or election shall be referred to the Commissioner of Education for determination* [Clause 1] *and his decisions in the matter shall be final and not subject to review* [Clause 2]."

With respect to Clause 1, the Court ruled, in effect, that the clause means what it says by holding:

"The courts have long interpreted Education Law 2037 and its predecessor statute as conferring exclusive original jurisdiction upon the Commissioner of Education regarding disputes over the validity of school district meetings and elections."

However, with respect to Clause 2 of Education Law 2037, the Court held differently. The Court ruled, in effect, that the clause ***does not*** mean what it says. Regarding Clause 2, the Court held: *"Judicial review of any unfavorable decision by the Commissioner"* ***is*** available. (Petitioners' emphasis).

The Court of Appeals went on to say that even though plaintiffs' complaint was based on a violation of the Constitution it *"did not obviate the* ***statutory*** *mandate to*

originate the matter before the Commissioner of Education." (Plaintiffs' emphasis).

In effect, therefore, the Court has ruled that on questions involving the construction of the Constitution and fundamental rights of the people, the people are to do what the Legislature has directed in Clause 1 of Education Law 2037 (i.e., the first "half" of Education Law 2037 means what it plainly says -- the people are to take all their complaints against School Boards of Education to the State Commissioner of Education for a determination), but the people can ignore the Legislature's statement found in Clause 2 (i.e., that the last "half" of Education Law 2037 does not mean what it plainly says -- that the Commissioner's decision is really ***not*** "final" and really ***is*** "subject to review".)

The Court's attention is directed here to the fact that the State Court decision appears to ignore its earlier constitutional holdings.

In People v Luce (1912) 204 NY 478, the Court held that the New York State Legislature cannot limit or abridge the general jurisdiction of the Supreme Court as conferred by this section (Article VI, Section 7.a).

In Niagara Falls Power Co. v Halpin (1944) 267 AD 236, 853, *affirmed* 292NY 705, the Court held that the jurisdiction of the Supreme Court is unlimited, unqualified and co-extensive with the boundaries of the State, and the Legislature has no power to deprive it of jurisdiction or to limit or qualify the same.

It is equally important to note that the Appellate Division has held that any legislative act depriving the Supreme Court of the jurisdiction it had when the Constitution was adopted or limiting or qualifying it is unconstitutional. Decker v Canjoneri (1939) 256 AD 68.

B. STAGE IN PROCEEDINGS WHERE FEDERAL QUESTIONS WERE RAISED

The "separate powers" issue was raised in the Appellate Division of State Supreme Court, as a result of the decision by the court of original instance.

In the Court of original instance, plaintiffs made the following relevant claims in their petition:

"In violation of Article VIII, Section 1 of the State Constitution, the State Department of Education and the Commack Board of Education used public funds to promote the passage of an $11.7 million bond proposition scheduled for referendum vote on October 14, 1992."

Paragraph 77(iii)
Page 27
Complaint-Petition

"Defendants are violating plaintiffs fundamental rights against a taking of their property, including the fruits of their labor, without due process which due process includes strict observance of and adherence to the State Constitution."

Paragraph 77(viii)
Page 28
Complaint-Petition

NOTE: State Supreme Court, Albany County, citing Education Law 2037, ruled, *"...the court agrees with defendants that it lacks subject matter jurisdiction to decide this controversy (case cited) and that it should be referred to the Commissioner of Education...."* (See Appendix C hereto, page A-24,25).

On appeal to the Appellate Division of State Supreme Court, petitioners raised the fundamental question of

"separate power." In their brief to the Appellate Division, under "Questions Presented," petitioners asked:

"2. With respect to plaintiffs' third claim (the first on appeal), a question is whether the intent and will of the people to have the Supreme Court have general, ***original jurisdiction*** *in law and equity, especially on questions involving the construction of the Constitution, as expressed in Article VI, Section 7.1, has been misconstrued by the Court below, in its ruling that the Commissioner, rather than the Supreme Court, has jurisdiction to decide the constitutional question raised?"*

In their brief to the Appellate Division, petitioners argued, *"The intent and will of the people, as expressed in the New York Constitution, is that the Supreme Court shall have general* ***original jurisdiction*** *in law and equity (Article VI, Section 7.a) and that all questions regarding the construction of the Constitution shall be ultimately decided by the Court of Appeals (Art. VI, Sec. 3.a.8)."* (Appellants' Brief, page 18).

Petitioners also argued, *"Education Law Section 2037 cannot give the Commissioner of Education the authority to determine the* ***constitutionality*** *of an act of officials and agencies within the Executive Branch. Only the Judiciary can rule on the constitutionality of any question; it is not the prerogative of either of the other branches."* (Appellants' Brief, page 21).

Petitioners also pleaded, *"certainly, as in the instant case, the Commissioner of Education should not be ruling on the constitutionality of any act of government, much less an act in which one of his employees has played a prominent, if not determinative role."* (Appellants' Brief, page 22).

Respondents' position was that any activity even remotely related to district meetings or district elections, not only ***had*** to be appealed to the Commissioner but that, under Education Law 2037, the Commissioner's

decision would be ***final*** and ***non-reviewable***. Respondents' position was, in effect, that no matter how unconstitutional the activity, no matter how tyrannical or despotic the behavior by local and state education officials, if that behavior remotely concerns district meetings or district elections (and what doesn't?) a citizen-taxpayer cannot bring the matter before the judiciary -- he or she must pray to the Education Commissioner for relief and whatever the Commissioner says, ***it's final and non-reviewable***, because "its in the law."

Petitioners argued in reply that *"the fact that there is a trail leading to the Commissioner's door on matters relating to education administration does not make him an arbiter on constitutional issues."*

NOTE: The Appellate Division ruled, *"Supreme Court dismissed this cause of action, on the basis that Education Law Section 2037 vests in the Commissioner of Education exclusive jurisdiction to resolve disputes... Education Law Section 2037 mandates review by the Commissioner in the first instance...Having failed to raise any question with regard to the constitutionality of the statute, or its application, in the court of first instance, petitioners may not rely on that argument in this court (case cited)."* (Appendix B, page 2).

On appeal from the Appellate Division's order to the Court of Appeals, petitioners argued, *"Plaintiffs' third cause of action involved a substantial question having to do with the construction of the Constitution and that it would be a misapplication of Education Law 2037 to dismiss this case on the basis of a lack of jurisdiction;"* and, *"if (and only if) Education Law 2037 had the legislative intent Supreme Court was giving to it, it would be in conflict with the State Constitution, Article VII, Sections 7.a and 3.b.8"* [the 'separate powers' principle in New York's constitutional, republican form of

government]; and, *"Before the lower courts gave Education Law 2037 the meaning they gave to it (and dismissed the case) they should have recognized this case to be a case in which* ***pro-se*** *plaintiffs essentially seek a declaration that the inclusion in the statutory scheme for the Commissioner to finally determine questions of constitutionality is unconstitutional;"* and *"the Commissioner is not qualified to rule on the constitutionality of any issue, especially since Education Law 2037 'shall be final and not subject to review;'"* and, *"if Education Law 2037 had the meaning being ascribed to it by respondents and Supreme Court, the Commissioner of Education would have the power of the Court of Appeals."* (Brief to the Court of Appeals, pages 4,5).

Under "Questions Presented" to the Court of Appeals, petitioners asked:

"2. Whether the intent and will of the people to have the Supreme Court have general, original jurisdiction in law and equity, especially on questions involving the construction of the Constitution, as expressed in Article VI, Sections 7.a and 3.b.8, has been misconstrued or overlooked by the Courts below, in their rulings that the Commissioner, rather than the Supreme Court, has jurisdiction to decide the constitutional question raised."

In their Reply Brief to the Court of Appeals, petitioners argued, *"The use of public funds to sway the results of an election through the use of propaganda, deception and falsehood and through the use of persuasive communications...is a constitutional question that the Court would be precluded from deciding if Commack's interpretation of Education Law 2037 is correct, especially since under Education Law 2037, the Commissioner's determinations "****shall be*** *final and non-reviewable."* (Reply Brief to Court of Appeals, page 8.)

On April 26, 1995, at oral argument before the Court of Appeals, petitioners argued:

"Commack and State defendants argue, in effect, as follows: 1) that in passing Education Law 2037, the state legislators ***donned judicial robes****; 2) that they* ***assumed the judicial function*** *of determining disputes involving questions of constitutionality; and 3) the legislators then* ***transferred their assumed function to the Commissioner*** *of the State Education Department.*

Commack and State defendants argue, in effect, that while the Legislature was at the business of passing Education Law 2037 it also transferred to the Commissioner the judicial function of finally determining all disputes with School Districts involving the construction and application of the Constitution.

Commack and State defendants are wrong and so were the lower Courts who, by the nature of their function, ***cannot consider only the acts of the Legislature and fail to consider the Constitution.***

The inclusion in our statutory scheme, of the authority allowing the Commissioner to determine questions of constitutionality, or legality, is patently unconstitutional.

The United States Supreme Court issued an opinion earlier this year in Plaut v Spendthrift Farm, *No. 93-112. The majority of the justices held that, 'The framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers in which colonial legislatures routinely meddled in judicial functions, and the framers created separated powers as a structural safeguard against such abuses, establishing high walls and clear distinctions.'*

Commack and State defendants see only low walls and vague distinctions. They would have the Court ignore the fundamental, constitutional, long-institutionalized principle of 'separate powers.' ***Defendants would have***

us reinstitute and sustain a system of co-mingled legislative and judicial powers.

Education Law Section 2037 should only give to the Commissioner the power to finally determine disputes involving particular matters that involve discretion and that do not involve the construction of statutes or the Constitution. This is desirable from the standpoint of efficient and effective government.

Any other interpretation of Education Law Section 2037 would make that statute repugnant to the Constitution and would result in the statute's abrogation.

Appellants firmly believe in the essentiality of the judicial function in protecting the people against the wrongful acts of government.

Our prayer is that the Court will reverse and, thereby, maintain the integrity of the Constitution which is our principal defense."

NOTE: The Court of Appeals ruled that, *"The Appellate Division and Supreme Court correctly concluded that, under Education Law Section 2037,* ***exclusive original jurisdiction*** *to determine that claim resided in the State Commissioner of Education...judicial review of any unfavorable decision by the Commissioner of Education regarding a complaint made pursuant to Education Law Section 2037 would have been available...that plaintiffs' complaint regarding the School Board's distribution of the allegedly tainted material was couched in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education."* (Petitioners' emphasis).

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the United States Constitution reads in relevant part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."

Clause 2
Fourteenth Amendment
United States Constitution

New York Education Law Section 2037 abridges the privileges and immunities plaintiffs enjoy under the "separation of powers" constitutional principle and under Article IV, Section 4, of the United States Constitution which reads in relevant part:

"The United States shall guarantee to every citizen in this Union a republican form of government...."

Article IV, Section 4
United States Constitution

Webster's Dictionary defines "***republican***" as, *"of, characteristic of, or having the nature of a republic."*

Webster's Dictionary defines "***republic***" as, *"a state or nation in which the supreme power rests in all the citizens entitled to vote (the electorate) and is exercised by representatives elected, directly or indirectly, by them* ***and responsible to them.*** *"* (Plaintiffs' emphasis).

In New York State, the elected representatives of the people are positioned to preserve and enhance individual liberty and freedom and to see that the will and intent of the people, as expressed in the New York Constitution are followed.

Education Law 2037 violates the "separation of powers" doctrine of the New York Constitution and specifically Article VI, Section 7.a, which reads:

"The supreme court shall have general ***original jurisdiction*** *in law and equity and the appellate jurisdiction herein provided."* (Plaintiffs' emphasis).

Article VI
Section 7.a
New York Constitution

The Court of Appeals has ignored the Fourteenth Amendment argument (that the State can't pass and the Court can't enforce a law that abridges plaintiffs privileges and immunities) and the "republican form of government" argument (that those in governmental power in N.Y.S. are responsible to the people, which have provided in Article VI, Section 7.a of their State Constitution, that the Supreme Court has ***original jurisdiction*** in all matters of law and equity).

According to the United States Supreme Court, the body politic is an absolute despotism; in constituting a government, the body politic distributes that power as it pleases and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries; the natural and necessary distribution of that power, with respect to individual security, is unto legislative, executive, and judicial departments; it is obvious, however, that every community may make perfect or imperfect separation and distribution of that power at its will. Livingston v Moore, 32 US 469. However, that will does not displace the "absolute despotism" of the body politic in the framework of legal considerations.

It has been said that if government is to function constitutionally, it is necessary for each of the repositories of constitutional power to keep within its power. Rescue Army v Municipal Court of Los Angeles, 331 US 459.

One branch of the government cannot permit its powers to be exercised by another branch. Wilson v School District, 328 Pa 225, 195 A 90, 113 ALR 1401.

The mere apportionment in the New York Constitution of the sovereign powers among the three co-ordinate branches of the government, ***without more,*** imposes upon each of those branches the affirmative duty of exercising its own peculiar powers for itself, and prohibits the delegation of any of those powers except in cases

expressly permitted by the Constitution. See Reilfoot Lake Lever Dist. v Dawson, 97 Tenn 151, 36 SW 1041.

The three departments of the State government are all of limited and defined powers, Loan Assoc. v Topeka, 87 US 655 and no department possesses any authority not granted by the State Constitution. Hepburn v Griswold, 75 US 603.

Frequently, (as in the case of the New York Constitution), there appears in a State Constitution an express division of the powers of government among the three departments and, all persons charged with official duties under one of the departments are forbidden from exercising any of the functions of another except as expressly permitted by the Constitution itself. Porter v Investors Syndicate, 287 US 346.

New York State is not a state in which no provision has been made in its Constitution for a separation of governmental powers. For instance, Article VI, Section 7.a gives to the Judiciary original jurisdiction in all matters of law and equity.

The presence of the distributive clause (Article VI, Section 7.a) in the State Constitution prevents the exercise of the functions of the judiciary by the Legislature and, for sure, the Legislature has no power to transfer powers which it does not have to the Commissioner of Education. See State ex rel. Kostas v Johnson, 224 Ind 540.

The power over original jurisdiction in all matters of law and equity has been compartmentalized in New York. It is in the Judiciary.

The State Commissioner of Education cannot exercise or usurp judicial powers or functions such as passing on constitutionality of official acts. See United States v Norton Salt Co., 338 US 632.

The most fundamental protection afforded by the doctrine of separation of powers lies in the power of the

courts to test legislative ***and executive*** acts by the light of the constitutional mandate and, in particular, ***to preserve constitutional rights.*** Bixby v Pierno, 4 Cal.3d 130.

Where, as in the Commack case, the facts out of which a legal obligation is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers ***prescribed by the constitutions of the state***. Harris v Commissioners of Allegany County, 130 Md 488, 100 A 733.

Under the American system of constitutional government, among the most important functions entrusted to the judiciary is the interpreting of constitutions. Webster v Cooper, 55 US 488. ***The Commissioner of Education is not to be put in a position of interpreting the Constitution.***

The power of the Legislature to grant original jurisdiction to the Commissioner of Education in matters of constitutionality or law is limited by the New York Constitution and must be obeyed. Railroad Co. v County of Otoe, 83 US 667.

Neither the Legislature nor the Commissioner of Education can encroach upon the jurisdiction and functions of the judiciary unless authority therefore is found in the State Constitution. Evansville v State, 118 Ind 426, 21 NE 267. ***The people of New York have not distributed such a power to the Legislature or the Commissioner.***

The Legislature cannot exercise any judicial function or "transfer" any judicial function to the executive except as may in terms be allowed to it by the Constitution itself. James v Appel, 192 US 129, and any legislative act (such as Education Law 2037) which clearly and manifestly exercises power properly belonging to the judicial department is unconstitutional, Ponder v Graham, 4 Fla 23.

In the instant case, the Court of Appeals held, *"That plaintiffs' complaint regarding the school board's distribution of the allegedly tainted materials was couched in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education. A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established (cases cited). Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief (case cited). Thus, plaintiffs' third cause of action was properly dismissed for lack of subject matter jurisdiction."*

With all due respect to the Court of Appeals, it erred. This matter does not involve a mere abuse of discretion by defendants Commack Board of Education and State Education Department. ***Defendants are charged with violating an important provision of the State Constitution*** -- the money, power and prestige of public office are not to be used to sway the results of an election. The Judiciary is to have original jurisdiction on such matters.

Moreover, the only evidence is an official governmental newsletter. There is no need for a hearing to resolve factual issues, much less an ***administrative*** hearing. That the newsletter was prepared and mailed by governmental agencies is undenied and undeniable. Regardless, the courts certainly know how and are prepared to get to the truth.

Forcing the people to take such a complaint as this to the very people in the Executive who violated the highest organ of law in the state, for a determination regarding the Executive's behavior, which determination is to be

based on the Executive's interpretation of the Constitution, is absurd to say the least. It is repugnant to petitioners' fundamental right to a "separation of powers" and to a "republican form of government."

Moreover, it is well known that when people appeal to the Commissioner of the State Education Department they ususally are forced to wait more than one year before the Commissioner makes a determination. Unlike the rules governing the Judiciary, there is no rule requiring the Commissioner to act within a given period of time.

Moreover, it is well known that the Commissioner almost never finds against the local Boards of Education in matters appealed to him.

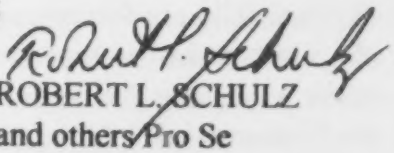
The only logical reason plaintiffs have come up with, for the willingness of the Court of Appeals to erode important constitutional principles, is that the Court of Appeals knows there are many complaints every year by the people, over non-discretionary actions by local school district officials and that the Court would rather not have Supreme Court burdened with all of those complaints, if they can avoid them. The State Court obviously prefers to have all those complaints taken to the Commissioner, by people who, based on their reading of Education Law 2037, believe they have to do that and who (the State Court would hope) believe further that the Commissioner's decision is final and not subject to review by Supreme Court (all based on a reading of Education Law 2037), and, therefore, would "go away."

The State Court knows that unless a person reads the case law, that person will conclude that he or she is precluded from appealing to the Supreme Court from a decision by the Commissioner. ***Most of the cases do not come up from a highly sophisticated legal source; rather they are brought by aggrieved people who do not have access to highly skilled, legal, constitutional advice.***

CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the opinion and order of the New York State Court of Appeals.

DATED: September 11, 1995
Respectfully submitted,



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Appendix A

Opinion and Order of the New York State Court of Appeals Dated June 14, 1995

STATE OF NEW YORK
COURT OF APPEALS

3 No. 133
Robert L. Schulz, et al., Appellants, OPINION

State of New York, et al., Respondents

Robert L. Schulz, for appellants Pro se.
Peter G. Crary, for State respondents.
Richard C. Cahn, for respondent school district.

LEVINE, J.:

Plaintiffs in this citizen-taxpayer action appeal as of right pursuant to CPLR 5601 (b) from so much of an order of the Appellate Division (205 AD2d 912) which affirmed the dismissal of their third, sixth and eighth causes of action in their complaint-petition (hereinafter, the "complaint"). The complaint, dismissed in its entirety by Supreme Court, set forth eight separate, factually unrelated causes of action having in common only that all alleged that various actions by State and local governmental officials constituted the use of public funds for private purposes in violation of article VII,

section 8, paragraph 1 and article VIII, section 1 of the State Constitution.

Plaintiffs also seek to bring up for review pursuant to CPLR 5501(a)(1) a prior non-final order of the Appellate Division (198 AD2d 624) which reversed Supreme Court's order referring to a referee plaintiffs' motion to hold defendant Commack Board of Education in contempt for proceeding with a scheduled school board referendum in violation of that court's order temporarily staying the board from conducting the referendum.

Plaintiffs' third cause of action alleged that the Commack Board of Education, using public funds, had prepared and distributed false promotional materials in favor of an affirmative vote on an $11.7 million bond proposition scheduled for a public referendum on October 14, 1992. Plaintiffs sought injunctive relief against holding that referendum and a declaratory judgment that the defendant State Department of Education must review in advance and approve all election literature prepared by any school district. One day before the referendum was to take place, Supreme Court granted an order staying the Commack Board of Education from holding the scheduled referendum before October 16, the return date of the show cause application for injunctive relief. The school board filed a notice of appeal from the court's October 13 order and held the referendum as scheduled. As previously noted, the Appellate Division reversed Supreme Court's order directing a reference on plaintiff's motion to hold the school board in contempt for violation of the order staying the referendum, and dismissed plaintiffs' contempt application.

Plaintiffs' sixth cause of action was targeted against defendant Mario M. Cuomo, then Governor, defendant Vincent Tese, then Commissioner of

Economic Development, defendant State Democratic Committee and the Governor's campaign committee, known as The Friends of Mario M. Cuomo Committee, Inc. That cause of action alleged that the publication and July 1992 mailing of a newsletter entitled, "The Voice of the New, New York" by the Governor's Office of Economic Development constituted the use of State monies to serve the private political purposes of the Governor, his campaign committee and the State Democratic Committee, in violation of article VII, section 8, paragraph 1 of the State Constitution.

Plaintiff's eighth cause of action alleged that the unconstitutional uses of public funds as set forth elsewhere in the complaint violated their rights under the Fifth and Fourteenth Amendments of the United States Constitution as a taking of their property without due process of law.

We modify by reversing the dismissal of plaintiff's sixth cause of action, reinstating that claim, and otherwise affirm.

I.

The Appellate Division properly affirmed the dismissal of plaintiffs' third cause of action. In that cause of action, plaintiffs sought to enjoin or invalidate the results of the Commack School District's bond referendum held October 14, 1992 because of the alleged distribution at public expense of partisan and false promotional literature regarding that referendum by the Commack Board of Education. The Appellate Division and Supreme Court correctly concluded that, under Education Law Section 2037, exclusive original jurisdiction to determine that claim resided in the State Commissioner of Education. Section 2037 states unequivocally that "[a]ll disputes concerning the validity of any district * * * election * * * shall be referred to the commissioner of education for determination * * *. The

commissioner may in his [or her] discretion order a new * * * election" (emphasis supplied).

The courts have long interpreted Education Law Section 2037 and its predecessor statute as conferring exclusive original jurisdiction upon the Commissioner of Education regarding all disputes over the validity of school district meetings and elections (see, Finley v Spaulding, 274 App Div 522, 526; Matter of Markert v Wilson, 284 App Div 1086, 1087; see also, Summerville v Roosevelt Union Free School Dist., 128 AD2d 769). The advantage of this course chosen by the Legislature is to provide an expeditious and more uniform resolution of these kinds of disputes (Finley v Spaulding, supra, 274 App Div, at 526; Matter of Pacos v Hunter, 29 Misc 2d 404, 405 [Jasen, J.], affd 14 Ad2d 990, appeal dismissed 11 NY2d 1112). The Commissioner of Education has exercised jurisdiction under section 2037 to hear complaints similar to that of plaintiffs here, that a school board has unlawfully used taxpayers' funds to promote a position in a district election (see, Matter of Chaplin, 29 Educ Dept Repts 388; Matter of Weaver, 28 Educ Dept Repts 183). Moreover, the Commissioner of Education could have granted the stay plaintiffs sought here from Supreme Court had they addressed their complaint to the Commissioner in the first instance (see, 8 NYCRR 276.1).

Contrary to plaintiffs' contention, judicial review of any unfavorable decision by the Commissioner of Education regarding a complaint made pursuant to Education Law Section 2037 would have been available and could have fully addressed their claim that false and partisan promotional materials were disseminated at school district expense (see, Matter of Phillips v Maurer, 67 NY2d 672; Matter of Capobianco v Ambach, 112 AD2d 640).

That plaintiffs' complaint regarding the school board's distribution of the allegedly tainted materials was couched in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education. A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established (see, Matter of Roberts v Coughlin, 165 AD2d 964, 965-966; Matter of Fichera v City of New York, 130 AD2d 128, 134-135). Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief (see, id.; accord, Matter of Patterson v Smith, 53 NY2d 98, 103-104 [merits of petitioner's Due Process claim not addressed because he failed to exhaust his administrative remedies]). Thus, plaintiffs' third cause of action was properly dismissed for lack of subject matter jurisdiction.

The Appellate Division also quite correctly reversed Supreme Court's order of reference on plaintiffs' motion to hold the Commack Board of Education in criminal contempt, and then denied their motion. As previously explained, under clear and long-established precedent, as well as unambiguous statutory language, Supreme Court lacked original subject matter jurisdiction over plaintiffs' third cause of action. Hence, Supreme Court also was without jurisdiction to entertain and then grant the provisional remedy plaintiffs sought in connection with that cause of action, that is, an order temporarily staying the referendum scheduled for October 14, 1992. Under those circumstances, the order staying the referendum was so manifestly lacking in validity that its disobedience cannot be punished as a contempt (Matter of Fish v Horn, 14 NY2d 905, 906;

People ex rel. Lower v Donovan, 135 NY 76, 79; DiFate v Scher, 45 AD2d 1002, 1003).

II.

Plaintiffs' eight cause of action must also fail. Plaintiffs have not alleged any actual appropriation of their individual property by the governmental action they describe, or even an indirect invasion of their specific property rights through regulation of the use thereof (cf., Lucas v South Carolina Coastal Council, ____ US ____, 112 S Ct. 2886). They merely alleged that governmental revenues, concededly acquired lawfully through State or local tax levies, have been misused or misapplied to private purposes. Plaintiffs, thus, have not validly alleged any violation of the Due Process or "takings" clauses of the Federal Constitution (US Const, 5th 14th Amends).

III.

We, however, reach a contrary conclusion regarding dismissal of plaintiffs' sixth cause of action. In that cause of action, plaintiffs alleged that in July 1992 the State Office of Economic Development, at the direction of Governor Cuomo and Commissioner Tese, printed and distributed by United States mail at State expense the Voice of the New, New York newsletter "to serve the individual and private purposes of Governor Cuomo, the New York Democratic State Committee and Mario Cuomo's campaign committee known as Friends of Mario M. Cuomo Committee, Inc." (complaint, 166). They allege that such use of public funds for the partisan political purposes of and advantages to those defendants violated article VII, section 8, paragraph 1 of the State Constitution. That provision, as relied upon by plaintiffs, reads as follows:

> 1. The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; * * *

We have previously described the history and purposes underlying the adoption of article VII, section 8 (see, Wein v State of New York, 39 NY2d 136, 142-144; see also, People v Ohrenstein, 77 NY2d 38, 50-51). The prohibition against gifts or loans to private enterprises was first incorporated into the Constitution in 1846, in reaction to the prior practices of subsidizing private railroad and canal companies through long-term State debt obligations, which the State ultimately was forced to pay when many of these private enterprises failed during the depression of 1837-1842 (Wein v State of New York, supra, at 143-144). Thus, subsidization by gifts of public funds to private undertakings, or by pledging public credit on their behalf, was banned, irrespective of how beneficent or desirable to the public the subsidized activity might seem to be (see, People v Ohrenstein, supra, 77 NY2d, at 51; People v Westchester County Natl. Bank, 231 NY 465, 475 [invalidating issuance of State bonds to fund veterans' bonuses]). And this remains so even when the subsidized private organization performs functions beneficial to the public (see, Fox v Mohawk & Hudson Riv. Humane Socy., 165 NY 517 [invalidating law making dog license fees payable to humane society]).

We think it is unassailable that the use of public funds out of a State agency's appropriation to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election would fall squarely within the prohibition of article VII, section 8, paragraph 1 of the Constitution. Manifestly, using public monies for those purposes would constitute a subsidization of a nongovernmental entity -- a

political party, candidate or political cause advanced by some nongovernmental group. Contrastingly, a governmental agency does not violate article VII, section 8, paragraph 1 merely by using taxpayers' funds for the valid governmental purpose of encouraging the public to participate in the democratic process by voting in an election. Nor would that constitutional provision prevent the use of public funds to inform and educate the public, in a reasonably neutral fashion, on the issues in an election so that voters will more knowledgeably exercise their franchise.

In Matter of Phillips v Maurer (67 NY2d 672, supra), we made the foregoing distinctions between a local school board's legitimate right to disseminate at public expense informational materials regarding its proposed budget preliminarily to the vote of the electorate on its approval, and the board's lack of authority "to disseminate information, at the taxpayers' expense, patently designed to exhort the electorate to cast their ballots in support of a particular position advocated by the board" (id., at 674).

It is true that in Phillips v Maurer (supra), the line between the use of public funds to inform voters and their use to promote an outcome of an election was drawn as a matter of statutory construction of a school board's powers under the Education Law (see, Education Law Section 1709 [33], 1716). Nonetheless, in that case we cited with approval two authorities making the same distinction as a constitutional imperative under article VII, section 8, paragraph 1 -- Stern v Kramarsky (84 Misc 2d 447) and 1980 Opinions of the State Comptroller No. 80-411. In the Phillips v Maurer decision we quoted the constitutional standard articulated in Stern v Kramarsky for permissible election activities and dissemination of election literature at public expense: "'[t]o educate, to inform, to advocate or to promote voting on any issue

may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy it may be' (Stern v Kramarsky, 84 Misc 2d 447, 452); * * *" (67 NY2d, at 674). We are satisfied that the guidelines set forth in Phillips v Maurer express the constitutional line of demarcation under article VII, section 8, paragraph 1.

Applying the foregoing standard to the Voice of the New, New York newsletter, we conclude that the document transgresses the constitutional boundary. It was disseminated on the eve of the Presidential campaign of 1992. Its subject matter covered one of the issues already then of primary interest in that campaign -- welfare reform. Although the newsletter contained a substantial amount of factual information which would have been of assistance to the electorate in making an educated decision on whose position to support on that issue, the paper undisputably "'convey[ed] * * * partisanship, partiality [and] disapproval by a State agency of [an] issue'" (Matter of Phillips v Maurer, supra, at 674 [quoting Stern v Kramarsky, supra, at 452]. Thus, the newsletter states:

> Led by the Bush Administration, Republicans in New York and across the nation are seeking to slash assistance to the needy.
>
> The Republicans appear to have devised a strategy of using distortions and half-truths about Medicaid and welfare to divide the people in a key election year.

The newsletter also reported the Governor's criticism of "President Bush and the Republicans for using welfare as the 'Willie Horton issue of the 1992 campaign'".

While the Voice of the New, New York did properly urge the public to vote and to "[s]tudy the

candidates", it also sought to enlist the public's support in opposition to the alleged Republican position on the welfare and medicaid reform issues. Thus, the newsletter urged: "[y]ou can also write at any time to your local representatives. Tell them that welfare and Medicaid is a lifeline during troubled times, and that they shouldn't pull in the lifeline while so many people are in need". Moreover, it proceeded to ask the public to "vote for the men and women who put people before politics", a thinly-veiled entreaty to vote against the previously disparaged Republican stance on the issues addressed.

Finally, the Voice of the New, New York newsletter contained a tear-sheet message to be sent to the Governor for the individual recipient among the public to sign and fill in a mailing address and telephone number, stating:

> Dear Governor Cuomo,
>
> I agree with you. New York must continue its constitutional mandate to protect the needy. I join you in leading the fight to provide programs and services to those who need it most. Let's not scapegoat the poor.

The conclusion is unavoidable that the latter portion of the newsletter is "patently designed to exhort the electorate to [make an avowed, public commitment] in support of a particular position advocated by [one political faction]" (Matter of Phillips v Maurer, supra, 67 NY2d, at 674 [emphasis supplied]).

In the foregoing respects, the Voice of the New, New York newsletter goes well beyond simply conveying information on a political issue and urging voters to participate in the democratic process. It is an unequivocal promotion of a partisan political position. Plaintiffs, therefore, have stated a valid cause of action

under article VII, section 8, paragraph 1 of the State Constitution in alleging that the Voice of the New, New York newsletter was prepared and disseminated at public expense. This remains so notwithstanding that the newsletter also "contains information that, standing alone, would be considered a proper attempt to educate the public" (Matter of Phillips v Maurer, supra, 67 NY2d, at 674 [emphasis supplied]).[1] Thus, so much of the order of the Appellate Division as affirmed dismissal of plaintiffs' sixth cause of action should be reversed, and that cause of action should be reinstated.

Accordingly, the order of the Appellate Division should be modified, in accordance with the opinion herein, and as so modified, affirmed, without costs.

Matter of Schulz, et. al. v State of New York, et. al.
No. 133

CIPARICK, J. (dissenting in part):

I respectfully dissent from that part of the Majority Opinion that reinstates the sixth cause of action, and conclude that the newsletter constitutes proper and permissible government speech.

In People v Ohrenstein (77 NY2d 38, 47), we specifically recognized that the myriad political functions a legislator performs to gain support in the community, including distributing newsletters and meeting constituents, are an inherent and legitimate part of an elected representative's job (emphasis added; see also,

---

[1] The dissenter's reliance on People v Ohrenstein (77 NY2d 38, supra) to justify the newsletter here because it had some educational content, is misplaced. Ohrenstein, as the dissent itself recognizes, refers only to the unique political functions of a legislator in the "'political' branch of government" (id., at 47).

United States v Brewster, 408 US 501, 512). I would extend this proposition to reflect the fact that any elected official, such as the governor, represents the interests of all citizens in the State, not only the official's constituents, and has an obligation to educate and inform the electorate on issues which may divide voters on party lines.

The newsletter at issue, the Spring 1992 edition of "The Voice of the New, New York[:] Spotlight on Issues Affecting the New, New York," appears to be educational, focusing on statistics concerning welfare and medicaid costs in an attempt to dispel what it characterizes as myths. A fair reading of this newsletter imparts two disparate views with regard to funding and reforming the programs that aid the needy, and, although the newsletter urges the recipient to vote, the decision on which platform to support remains with the voter. This is not a case where a specific proposition is presented to the voters, urging them to vote "yes" (see, Matter of Phillips v Maurer, 67 NY2d 672, 674; Stern v Kramarsky, 84 Misc 2d 447 [public funds as trust funds]), nor is it a case where monies were solicited from the voter to further a particular cause or candidate (see, Hoellen v Annunzio, 468 F2d 522, 525, cert denied 412 US 953). The invitation to respond to the governor does not constitute an improper exhortation or solicitation; rather it is a convenient follow-up for the voter who seeks further information. In fact, the timing of this newsletter -- at least four months prior to the November election -- underscores its informational character. Thus, I disagree with the Majority's characterization of this newsletter as the "unequivocal promotion of a partisan position" (Majority Opn, at 12) that is patently designed to exhort the electorate to cast their ballots in support of a particular position. Moreover, there is no evidence that the dissemination of this newsletter was intended to serve

the private political purposes of the Governor, his campaign committee and the State Democratic Committee, as alleged by plaintiffs.

It is never an easy task to distinguish between partisan advocacy designed to perpetuate the elected official's tenure and the "legitimate" partisan platform an incumbent may advocate. The latter is necessary to explain and defend the governmental policy which the elected official participates in shaping, and often creates the incentive for that person to retain the elected post (Shiffrin, Government Speech, 27 UCLA L Rev 565, 603; Hoellen v Annunzio, 468 F2d, at 525, supra). In this regard, the governor and his executive agency must be permitted to perform legitimate political activities without the threat of a challenge that public monies were spent in violation of the Constitution.

Accordingly, I would affirm the order of the Appellate Division in its entirety.

* *

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone, Bellacosa and Smith concur. Judge Ciparick dissents in part in an opinion.

Decided June 14, 1995

Appendix B

Memorandum and Order of the New York State
Supreme Court Appellate Division,
Third Judicial Department
Dated June 16, 1994

SUPREME COURT - APPELLATE DIVISION
THIRD DEPARTMENT

Decided and entered: June 16, 1994 69971

ROBERT L. SCHULZ et al.,
Appellants,

v OPINION AND ORDER

STATE OF NEW YORK et al.,
Respondents.

Calendar Date: April 27, 1994

Before: Mikoll, J.P., Mercure, Crew III, Yesawich Jr.
and Peters, JJ.

Robert L. Schulz, Glens Falls, appellant in person.

G. Oliver Koppell, Attorney-General (Peter G Crary of counsel), Albany, for State of New York, respondent.

Cahn, Wishod & Lamb (Richard C. Cahn of counsel), Melville, for Commack Union Free School District, respondent.

Paul M. Whitaker, Albany, for New York Democratic State Committee, respondent.

Robert J Cimino, County Attorney (Christopher A Nicolino of counsel), Hauppauge, for County of Suffolk and others, respondents.

Yesawich Jr., J.

Appeal from that part of a judgment of the Supreme Court (Cardona, J.), entered July 12, 1993 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted motions to dismiss the third through sixth and eighth causes of action in the petition.

In this combined action and proceeding, petitioners maintain that certain expenditures of public funds by various governmental entities and individuals have been made in contravention of the mandates of the State Constitution (see, NY Const, art VII, section 8). The petition having been dismissed in its entirety, petitioners appeal, arguing that Supreme Court erred in dismissing their third, sixth and eighth causes of action.[1]

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[1] Petitioners' acknowledgement, in their reply brief, that the fourth and fifth causes of action are now moot renders it unnecessary to address those claims.

The third cause of action seeks an injunction preventing a school district election on a proposed bond issue, or preventing the tallying of votes from that election, a declaration that it is unconstitutional for a school board to use public funds to encourage support of a bond issue, and an order directing respondent State Department of Education to review all literature disseminated by local boards of education in conjunction with any proposition placed on the ballot in a school district election. The claim arises from petitioners' perception of literature distributed by respondent Board of Education of the Commack Union Free School District as biased toward passage of a bond act and factually incorrect or misleading.

Supreme court dismissed this cause of action, on the basis that Education Law section 2037 vests in the Commissioner of Education exclusive jurisdiction to resolve disputes over the validity of school district meetings or elections. This court previously held, when addressing respondents' appeal of an interlocutory order, that Education Law section 2037 mandates review by the Commissioner in the first instance (198 AD2d 624, appeal dismissed ___ NY2d ___ [Apr. 28, 1994]); that holding is now the law of the case and we find no reason to permit petitioners to relitigate the issue.[2]

---

[2] Although the Court of Appeals dismissed petitioners' appeal of that prior order on the ground that it did not finally determine the controversy, dismissal on this basis does not foreclose the possibility of obtaining review in the context of an appeal of the final order (see, CPLR 5501 [a] [1]).

On appeal, petitioners for the first time suggest that Education Law section 2037 may be unconstitutional, as applied to their claim. In Supreme Court, however, petitioners' only contention was that the dispute fell outside the scope of Education Law section 2037 because it was brought prior to the election, rather than afterward. Having failed to raise any question with regard to the constitutionality of the statute, or its application, in the court of first instance, petitioners may not rely on that argument in this court (see, Matter of Latrice R., 93 AD2d 838, lv denied 59 NY2d 604).

Also for the first time, petitioners now assert that Education Law section 2037 does not apply to the instant dispute because the allegations of the petition are not directed at the validity of the election itself, but at respondents' use of public funds. Petitioners contend that inasmuch as this new argument is addressed to the question of subject matter jurisdiction, their failure to raise it earlier is not fatal. We disagree, for the proscription against court review of election disputes is not, technically, a limitation on subject matter jurisdiction, but rather a legislative direction that cases within the scope of Education Law section 2037 be resolved in the first instance by the Commissioner (see, People v Davis, 27 AD2d 299, 305; see also, Motor Vehicle Mfrs. Assn. of the U.S. v State of New York, 75 NY2d 175, 184). It is only after the Commissioner has acted that the Supreme Court will exercise its jurisdiction in this area (see, Finley v Spaulding, 274 App Div 522, 526; Guariglia v De Furio, 34 Misc 2d 200, 204-205). This case presents no exceptional circumstances warranting a departure from this principle. If petitioners are aggrieved by the Commissioner's decision, and believe it to be unconstitutional, or in any other way arbitrary and

capricious, they may then seek relief by means of a CPLR article 78 proceeding (see, Matter of Colson v Allen, 285 App Div 797, 798; Matter of Pacos v Hunter, 29 Misc 2d 404, 406, affd 14 AD2d 990, appeal dismissed 11 NY2d 1112; cf., Matter of Vecchio v New York State Dept. of Educ., 189 AD2d 961, lv denied 81 NY2d 709).

In their sixth cause of action, petitioners assert that the expenditure of public funds by the Governor and the Commissioner of the State Department of Economic Development for the production and distribution of an allegedly partisan newsletter was improper, and therefore they seek return of the moneys spent. For the most part, the newsletter in question is educational, consisting of facts and statistics regarding State welfare and Medicaid programs and expenditures. Although it does refer to "this important election year" and suggests that concerned citizens "vote for the men and women who put people before politics", it leaves it up to the voter to determine which candidates meet that description and does not explicitly advocate voting for any particular person, party or issue. Consequently, we agree with Supreme Court that the expenditure of public funds for its production did not violate NY Constitution, article VII, section 8.

Petitioners' other contentions have been considered and found meritless.

Mikoll, J.P., Mercure, Crew III and Peters, JJ, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Michael J. Novack

Appendix C

Decision and Order of the New York State Supreme Court Dated July 8, 1993

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ROBERT L. SCHULZ, JOHN SALVADOR, JR., GILBERT O. BOEHM, NORMA SCHMUCKER, HERMAN O. SCHMUCKER, ANDREA VECCHIO, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI, GORDON ROSS WEBB, PATRICIA FRIEDMAN, JAMES J. MORRIS, III, ELIZABETH HUGHES, KLAUS J.E. TODTE, ELEANOR MORRIS, LEONARD J. HOSELER, JOHN M. LASALA, WILLIAM A. GAGE, NICHOLAS L. CLESCERI, WILLIAM C. BUSCH, JR., FRANK ABRAMI, LEONARD GOKEY, GEORGE LONG, GARY E. YEANEY, EDWARD P. SCHARFENBERGER, ANGELO J. GIFALDI, FRANCES KAMINSKY, NICHOLAS L. D'ARGENIO, PAT J. BELDOTTI, CHARLES M. RICHARDSON, R. ERIK SCHNACKENBERG, ROBERT P. PERAZA, JAMES A. MILLER, EDWARD C. BALDYGA, MARY B. BROPHY, GEORGE D. MC GOWAN, MARY C. MC KIERNAN, ROBERT L. SPROSSEL, CALVIN H. CARR, JUDITH A. FORD, GAIL F. GORDON, GARY J. WOODS, SHIRLEY A. COLIN, DANA J. PERYEA, DALE R. FRENCH, SUSAN E. CRAWFORD, HENDRICK OVERBEEK, LINDA D. TELLIER, MICHAEL E. WADE, SALVATORE J. GRENCI, WELTON T. MYERS, PETER C. RUH, JOSEPH F. ZEITLER, CAROL CRIS, MARY MC HUGH, PETER CANDELA, RAY DE NATALE, OTTO SYKORA, and

DR. PAUL B. CARUSO,

Plaintiffs-Petitioners

- against -

THE STATE OF NEW YORK and MARIO M. CUOMO, GOVERNOR OF THE STATE OF NEW YORK; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT, NEW YORK DEMOCRATIC STATE COMMITTEE, AND FRIENDS OF MARIO M. CUOMO, COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION; THE COUNTY OF SUFFOLK, THE SUFFOLK COUNTY LEGISLATURE, THE SUFFOLK COUNTY EXECUTIVE, ROBERT GAFFNEY; THE OFFICE OF THE NEW YORK STATE COMPTROLLER, EDWARD V. REGAN, COMPTROLLER OF THE STATE OF NEW YORK; THE NEW YORK STATE BOARD OF ELECTION, OWEN T. SMITH, CHAIRMAN; THE NEW YORK STATE BOARD OF CANVASSERS, OWEN T. SMITH, CHAIRMAN, VINCENT GRABER, NEW YORK STATE ASSEMBLY SPEAKER PRO-TEM,

Defendants-Respondents.

Supreme Court Albany County Motion Term November 20, 1992. (RJI No. 0192031996)

(Justice Anthony V. Cardona, Presiding)

APPEARANCES: Robert L. Schulz et. al.
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CARDONA, J:

This is a combined declaratory judgment and citizen-taxpayer action pursuant to State Finance Law Article 7-A.

The plaintiffs-petitioners (hereinafter plaintiffs) have joined eight separate, distinct and unrelated lawsuits

in this one voluminous Verified Complaint-Petition (hereinafter the "Complaint"). While these actions share a common question of law, i.e., use of public funds for private purposes in violation of Articles VII or VIII of the New York State Constitution, each action arises out of a different series of transactions or occurrences and thus the joinder of all of these defendants is improper. CPLR Section 1002 (b). No severance is being directed, however, in light of the court's summary disposition of the matters submitted to it. Defendants have moved to dismiss the Complaint. In addition, the Suffolk County defendants seek the imposition of sanctions against Plaintiff Schulz.

The First Cause of action (complaint pars. 78-95 & 107-110) seeks to prevent the "Jobs for the new, New York Bond Act (L. 1992 Chapter 649) ("Jobs Bond Act") from being submitted to the electorate on November 3, 1992.

Petitioners contend that defendants State of New York and Governor Cuomo are using public funds to promote passage of the Jobs Bond Act through dissemination of printed material and broadcast communication.

The Jobs Bond Act (Proposal 1) went down to defeat in the November 3rd election. Therefore the court finds that the First Cause of Action is moot and dismisses same under the authority of Schulz v State of New York, 182 AD2d 3, mot for leave to app denied, 80 NY2d 761.

The Second Cause of action (complaint, Pars. 96 & 111-113) seeks to hold Governor Cuomo in contempt of an October 15, 1990 Albany Supreme Court Judgment (Index No. 5832-90) which enjoined Governor Cuomo and other named respondents from distribution of material containing the slogan "Keep New York Clean and Green" and another specific statement.

The Judgment of October 15, 1990, was issued in an entirely separate court action. It contained an order enjoining specific activity deemed to promote passage of an entirely different bond act (the 1990 Environmental Bond Act). Plaintiffs have not alleged that any of the material found to be objectionable under that Judgment is now being distributed. Therefore, this action lacks merit and accordingly it is dismissed.

The Third Cause of action (complaint, Pars. 97 & 114-132) seeks to enjoin and/or invalidate a bond issue referendum of the defendant Commack School District which was held on October 14, 1992. The bond issue, to finance the District's proposed capital repair program, won approval of the District's voters 1,566 to 716.

Plaintiffs contend that the Commack School District prepared and distributed two newsletters and a pamphlet, materials which they allege were designed to "entice" a "yes" vote from the voters, using public funds, in violation of Article VIII, Section 1 of the State Constitution.

As noted above, the election in this matter has already occurred, thus the requests for injunctive relief are moot:

Furthermore, Education Law Section 2037 provides:

> All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election.

Although characterized by plaintiffs as a "pre-election case" (Reply Affidavit Par. 83), the court agrees

with defendants that it lacks subject matter jurisdiction to decide this controversy (see, Sunmerville v Roosevelt Union Free School District, 128 AD2d 769; Finley v Spaulding, 274 App.Div. 527 at 526) and that it should be referred to the Commissioner of Education, who has exercised jurisdiction over similar claims involving the expenditure of district funds to exhort voters to approve budgets and/or bond propositions. Matter of Greenspan, 29 Ed. Dept. Rep. 397; Matter of Chaplin, 29 Ed. Dept. Rep. 388; Matter of Kolkmeyer, 29 Ed. Dept. Rep. 448; Matter of Blake, 27 Ed. Dept. Rep. 89. Accordingly, the court dismisses plaintiffs' Third Clause of action for lack of jurisdiction.[1]

The Fourth Cause of Action (complaint paras. 98 & 133-138) challenges as unconstitutional, a resolution (No. 1763-92) approved by the Suffolk County Legislature on or about September 23, 1992, which authorized the expenditure of $500,000, through the issuance of serial bonds over a five-year period, for the planning and design of a $7.5 million dollar, 6,000-seat, multi-purpose sports complex. Plaintiffs contend that the $500,000 expenditure represents a gift of county funds in aid of a private, professional sports organization, in

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[1] The court disagrees with Defendant Commack that plaintiffs "have waived any right they may have had to challenge the referendum", by failing to file a petition with the Commissioner within the 30-day period (Education Law Section 310) following the October 14, 1992 referendum. (Cahn Supplement Affidavit, paragraph 5) The Commissioner has excused the untimely filing of a petition where a petitioner first sought judicial review and his judicial action was dismissed as being within the exclusive jurisdiction of the Commissioner, provided the petition is made within a reasonable time after petitioners' receipt of the court's decision. 30 Ed. Dept. Rep. 264.

violation of Article VIII, Section 1 of the New York State Constitution.[2]

In Murphy v. Erie County, 28 NY2d 80, taxpayers also challenged as unconstitutional under Article VIII, Section 1, county spending on a sports stadium to be leased to, or managed by, a private company for either 20 or 40 years. In Murphy, the county did not retain any right to use the stadium during the time that it was controlled by the private party. The Court of Appeals upheld the constitutionality of the expenditures because of the public benefit the county's residents derived from access to recreational or entertainment events. The court stated:

> That the county may not itself be using the stadium seems irrelevant to these purposes, for it is evident that the county's residents will be obtaining the full benefit for which the stadium is intended, the ability to view sporting events and cultural activities, regardless of the identity of the party operating the stadium. The fact that the very public purpose for which the stadium is authorized will be served by it, even though Kenford will also derive a benefit from it, distinguishes this case from those. . .where the benefit of the challenged expenditure accrued only to a private party.
>
> 28 NY2d at 87-88.

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[2] Article VIII, Section 1 is pertinent part provides:

> No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking . . . nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking...

The resolution approved by the Suffolk County Legislature recites that the stadium would be used "by Suffolk Community College and other community organizations for sporting and other special events" as well as by a Double A professional baseball team, which is contemplated to be the prime tenant. While the prime tenant will no doubt derive benefit from the construction of the proposed sports complex it is, in this Court's view, incidental to the primary public purpose of the complex. Accordingly, the court awards judgment in favor of the defendants and declares that the challenged resolution does not violate Article VIII Section 1 of the State Constitution.

In their Fifth Cause of Action (complaint paras. 99 & 139-144), plaintiffs allege that the state defendants are expending state funds illegally through grants-in-aid to Suffolk County, because these grants enable the County to use its local tax revenues for other unconstitutional purposes such as that claimed in the Fourth Cause of Action above.

The State-aid appropriations to Suffolk County constitute gifts to the County as a matter of law and as such they are constitutional. Wein v City of New York, 36 NY2d 610. That the County may use its own revenues for other purposes deemed by plaintiffs to be illegal does not change the character of the payment by the State from legal to illegal. Plaintiffs' Fifth Cause of Action fails to state a cause of action against the state defendants, accordingly, it is dismissed.

The Sixth Cause of Action against Governor Cuomo and Commissioner Tese seeks: a declaration that the preparation and distribution of the Spring 1992 edition of "The Voice of the New, New York," a newsletter, was unconstitutional as violative of Article

VII Section 8(1),[3] and reimbursement for the public funds allegedly expended.

Defendants maintain that the Governor "as the elected head of the executive branch of government holds a 'political' position and is entitled to speak or write on any issue he feels needs to be addressed. Such activity is part and parcel of his responsibilities as Governor." (Doolittle Affirmation Para. 17) The issue is not whether the Governor should be prohibited from expressing his views on matters of public concern. "Public officials have the right of free speech, and in fact, have a responsibility to express their views on any issue which affects the electorate they serve." Matter of Schulz v State of New York, 148 Misc2d 677, 679. They may not, however, use public funds "to exhort the electorate to cast their ballots in support of a particular position" (Matter of Phillips v Maurer, 67 NY2d 672, 674) which they advocate. "To educate, to inform, to advocate or to promote voting on any issue may be undertaking, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be." Stern v Kramarsky, 84 Misc 2d 447, 452; see also, Matter of Phillips v Maurer, supra, at 674. The challenged newsletter does contain expressions of political opinion. Viewed in its entire context, however, the newsletter does not rise to the level of exhorting the electorate to vote for a particular person, party, or issue. Consequently, the court grants judgment on the Sixth Cause of Action in favor of the defendants and declares that the Spring 1992

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[3] This section provides in relevant part as follows:

> The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking. . . . .

edition of "The Voice of the New, New York," does not violate Article VII Section 8(1) of the New York State Constitution.

In their Seventh Cause of Action (complaint Paras. 101 & 179-192) plaintiffs claim that New York Assemblyman Vincent Graber has collected travel reimbursement from the State in violation of Article VII Section 8(1) of the New York State Constitution. The travel vouchers which form the basis of this cause of action are dated in April and June of 1991. As the Attorney General correctly points out: "A complaint under Article 7A of the State Finance Law must be brought within one year of the challenged activity (CPLR 215 [4] Matter of New York State Association of Plumbing - Heating - Cooling Contractors v Egan, 65 NY2d 793." (Doolittle Affirmation Para. 21). The instant cause of action is barred by the statute of limitations. Accordingly, it is dismissed.

Plaintiffs' Eight Cause of Action (complaint paras. 193-195) asserts that the alleged misuse of taxpayer funds constitutes a denial of due process under the Fifth Amendment to the United States Constitution.

Plaintiffs' offer a single conclusory statement in support of this cause of action: "It is a violation of plaintiffs' fundamental right as expressed in said Fifth Amendment for the Executive or Legislative branch of the State of New York, a county subdivision of the State of Ndw (sic) York, or a school district subdivision of the State of New York to take money from plaintiffs-voters-citizens-residents-taxpayers in violation of the provisions of the State Constitution and its laws." (complaint para. 195)

Plaintiffs have had access to the court and an adequate opportunity to challenge on the merits, the actions of the defendants alleged to be in violation of Articles VII and VIII of the New York State Constitution.

The requisites of due process have been satisfied. Accordingly, this cause of action is dismissed for failing to state a cause of action.

Finally, the court addresses the motion by the Suffolk County defendants for the imposition of sanctions against Plaintiff Schulz.

> A court may in its discretion award costs, including reasonable counsel fees, and impose sanctions upon any party or attorney who engages in frivolous conduct in the course of a civil action or proceeding (22 NYCRR 130-1.1 [a]). Conduct is deemed to be frivolous if:
>
> "(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal or existing law; or
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c]).
> Schulz v State of New York, 175 AD2d 356, 357.

The Suffolk County defendants offer two reasons for the imposition of sanctions against Plaintiff Schulz: The First reason is that he improperly venued the action against them in Albany County rather than Suffolk County pursuant to CPLR 504. The Suffolk County defendants cite an earlier Supreme Court decision in a taxpayer action involving Plaintiff Schulz and the Suffolk County Defendants wherein the court granted a motion to change venue to Suffolk County in reliance on CPLR 504. In that case, the transferred action appears to have been one involving the issuance of bonds by the Town of Huntington. In the instant case, plaintiffs not only

challenged Suffolk County's resolution approving the issuance of bonds but also the disbursement of State-aid to Suffolk County. State Finance Law Section 123-c(1) is itself a venue provision for Citizen-Taxpayer actions. It requires a taxpayer action "to be brought in the supreme court in any county wherein the disbursement has occurred, is likely to occur, or is occurring, or in the county in which he state officer or employer has his or her principal office." Furthermore, since Suffolk County was the recipient of State-aid challenged in plaintiffs' Fifth Cause of Action, it was properly joined, at the outset of the action, as a party defendant with the State. State Finance Law Section 123-b(2). In short, this Court does not find that Plaintiff Schulz's initial choice of venue was frivolous.

The second reason advanced by the Suffolk County defendants in support of their application for sanctions is that plaintiffs' Fourth Cause of Action challenging the constitutionality of their local bond resolution was frivolous in light of the decision of the Court of Appeals in Murphy v Erie County, supra. In Murphy, the Court approved public funding of a sports stadium under similar circumstances because the benefit to the private party in that case was viewed as incidental to the primary public purpose underlying construction of the stadium. The court disagrees with the contention of the Suffolk County Defendants that Plaintiff Schulz' arguments were aimed at a reversal of Murphy. Rather, the court read Plaintiff Schulz' arguments as an attempt to demonstrate (consistent with the holding in Murphy) that the benefit, if any, to be derived by the taxpaying public in Suffolk County was incidental to the primary object of the Suffolk County stadium project: the construction of a ballpark to house a private sports team. That Plaintiff Schulz' arguments in the instant action failed to persuade does not, in this Court's view, render

them frivolous. The application for sanctions against Plaintiff Schulz is, in all respects, denied.

All papers and their exhibits including plaintiffs' video and audio tapes, together with this Decision and Order, are being returned to the Attorney General. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.
Enter.

Dated: Albany, New York
July 8, 1993

Anthony V. Cardona
Presiding Justice

Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

No. 95-451

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT L. SCHULZ, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and SALVATORE GRENCI,

Petitioners,

–v.–

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT, NEW YORK DEMOCRATIC STATE COMMITTEE, FRIENDS OF MARIO M. CUOMO COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION,

Respondents.

On Petition For A Writ of Certiorari
To The Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Were the Petitioners' claims under the New York State Constitution that Respondent Commack Union Free School District used public funds for private purposes, sufficient to raise a substantial federal question so as to confer jurisdiction upon this Court?

2. Since the Petitioners did not allege any actual appropriation of their individual property by the action they described, or even an indirect invasion of their specific property rights through regulation of the use thereof, did they validly allege any violation of the due process or takings clause of the Federal Constitution?

3. Since the Petitioners failed to raise in the New York Courts any question with regard to the constitutionality under the Guarantee Clause of the state statute that conferred exclusive jurisdiction in the first instance upon the Commissioner of Education, of school district election matters, was that claim preserved for review in this Court? If the claim was preserved, is it justiciable?

4. Do the Petitioners Schulz and Grenci possess standing to raise the claims presented in the Petition?

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No. 95-451

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT L. SCHULZ, NICHOLAS J. SELVAGGIO, GAETANO V. CRUCIANI and SALVATORE GRENCI,

Petitioners,

-v.-

THE STATE OF NEW YORK, MARIO M. CUOMO, GOVERNOR; THE NEW YORK STATE LEGISLATURE, RALPH MARINO, MAJORITY LEADER OF THE SENATE, SAUL WEPRIN, SPEAKER OF THE ASSEMBLY; VINCENT TESE, INDIVIDUALLY AND AS COMMISSIONER OF THE ECONOMIC DEVELOPMENT DEPARTMENT, NEW YORK DEMOCRATIC STATE COMMITTEE, FRIENDS OF MARIO M. CUOMO COMMITTEE, INC., THE NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBEL, AS COMMISSIONER OF EDUCATION; THE COMMACK BOARD OF EDUCATION,

Respondents.

On Petition for A Writ of Certiorari To The Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

With respect to Petitioners' Guarantee Clause claim, the jurisdiction of this Court is *not* properly invoked because that question was not raised in the state courts, and in any event, that claim is nonjusticiable.

With respect to Petitioners' claims under the Due Process clauses of the Fifth and Fourteenth Amendments, the jurisdiction of the Court is purportedly invoked pursuant to 28 U.S.C. § 1257(a). However, Respondent believes that the Petitioners' federal due process claims were inadequately pleaded, and that the Court lacks jurisdiction over those claims as well.

STATUTES INVOLVED

Petitioners principally claimed that the Respondent Commack Union Free School District ("the School District") violated Article VIII, Section 1 of the New York Constitution by using public funds to prepare and distribute partisan literature in connection with an impending bond referendum. They also claimed that the School District's alleged actions deprived them of their property, "including the fruits of their labor," without due process. The New York Court of Appeals assumed that Petitioners were attempting to invoke due process claims under the Fifth and Fourteenth Amendments to the United States Constitution, but rejected those claims. (Pet. for Cert. at A-6.)

Petitioners claimed for the first time on their intermediate state appeal that New York Education Law § 2037, which deprives the New York courts of

jurisdiction in the first instance over school election disputes, is unconstitutional as applied to their claim, because it deprives the court system of original jurisdiction in law and equity, contrary to Article VI Section 7(a) of the State Constitution. In their Petition for *certiorari*, Petitioners assert a claim never raised in the state courts: that violation of Articles VI and VIII of the New York Constitution also constitutes a violation of the Guarantee Clause found in Article IV, Section 4 of the United States Constitution.

STATEMENT OF THE CASE

Petitioners filed a combined action/special proceeding in the New York Supreme Court, asserting a variety of claims against a number of State and local officials, arising from various unrelated government actions. They claimed that the Commack Union Free School District (sued herein as "The Commack Board of Education") violated the New York State Constitution by disseminating, at taxpayers' expense, partisan literature designed to encourage support for a bonding referendum, which, it was asserted, violated Article VIII, Section 1 of the New York State Constitution, a provision that prohibits school districts from giving or lending money or property in aid of a private undertaking. The action was dismissed by Supreme Court, Albany County, on the grounds that New York Education Law § 2037 confers upon the State's Commissioner of Education exclusive original jurisdiction over school district election matters. (Pet. for Cert. at A-19.) The Appellate Division of the Supreme Court unanimously affirmed (Pet. for Cert.

at A-14), as did the New York Court of Appeals (Pet. for Cert. at A-1). This Petition for *Certiorari* followed.

In a separate cause of action in their initial pleading, Petitioners claimed that the actions of the School District violated their fundamental rights "against a taking of their property . . . including the fruits of their labor, without due process." (Pet. for Cert. at 12.)

Petitioners attempted in the Appellate Division to challenge the constitutionality of Section 2037 as applied, but the Court noted that they had failed to make that claim in the court of first instance; accordingly, their attempt to raise the question for the first time in the Appellate Division was rejected by that Court. (Pet. for Cert. at A-17.)[1]

Without having raised the question in any New York court, Petitioners now make the additional claim that the separation of powers principle embodied in the State Constitution (see n. 1, *supra),* is an essential part of New York's compliance with the Guarantee Clause of the Federal Constitution, so that New York's declining to allow its courts to assume original jurisdiction over constitutional questions arising in the school election context deprives Peti-

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1 The rejected claim appeared to be that Section 2037 violated Article VI, Section 7(a) of the State Constitution, which confers original jurisdiction upon New York's Supreme Court in law and equity. (Pet. for Cert. at 12-13.) They claimed that the State Constitution requires the State Courts, as contrasted with the State Education Commissioner (who is an officer of the Executive Branch of State government), to decide constitutional questions in the first instance.

tioners of their federally protected right to a republican form of government. (Pet. for Cert. at 7, 18-19.)[2]

In their Petition, Petitioners fail to note that their alleged lack of recourse to the court system was definitively addressed by the Court of Appeals, which ruled that, contrary to Petitioners' contention, judicial review of a determination of the Commissioner of Education was available in a school election case:

> That plaintiffs' complaint regarding the school board's distribution of the allegedly tainted materials was couched in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education. A constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established. . . Moreover, merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief.

(Pet. for Cert. at A-5.)

The Court of Appeals treated Petitioners' federal due process claims as having been properly identified in the pleading (a conclusion with which Respond-

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2 New York's Court of Appeals did not reach or decide any claims based upon the federal constitution's Guarantee Clause, because no such claims were asserted in the state court proceedings.

ent disagrees), but held that such claims were insufficiently pleaded because "plaintiffs had not alleged any actual appropriation of their individual property by the governmental action they describe, or even an indirect invasion of their specific property rights through regulation of the use thereof." (Pet. for Cert. at A-6.)

Petitioners Robert L. Schulz and Salvatore J. Grenci are non-residents of the School District, and hence lack standing.

REASONS FOR DENYING THE WRIT

POINT I.

TO THE EXTENT THE PETITION IS BASED UPON A GUARANTEE CLAUSE CLAIM, THIS COURT LACKS JURISDICTION TO ENTERTAIN IT BECAUSE THAT CLAIM WAS NOT RAISED BELOW.

The Petitioners failed in the State Court proceedings to make any claim based upon the Guarantee Clause. (U.S. Const. Art. IV, Section 4.) The state constitutional separation of powers claim, upon which the federal Guarantee Clause claim is now based, was not raised in the court of original instance, and the Appellate Division, relying upon established New York precedent, properly declined to rule upon it. (Pet. for Cert. at A-17.) Therefore, Petitioners' Guarantee Clause claim was not adequately presented to the State Courts, and this Court lacks jurisdiction to decide it. *Board of Directors of Rotary International*

v. Rotary Club of Duarte, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948 (1987).

POINT II.

EVEN IF THE GUARANTEE CLAUSE CLAIM HAD BEEN RAISED BELOW, THERE IS NO JUSTICIABLE CLAIM BASED UPON NEW YORK'S HAVING CONFERRED EXCLUSIVE JURISDICTION IN THE FIRST INSTANCE UPON ITS COMMISSIONER OF EDUCATION, INSTEAD OF ITS COURTS, TO DECIDE DISPUTES ARISING OUT OF SCHOOL DISTRICT ELECTIONS, PARTICULARLY SINCE NEW YORK PERMITS JUDICIAL REVIEW OF THE COMMISSIONER'S DETERMINATIONS IN SUCH CASES.

Even if timely pleaded, Petitioners' Guarantee Clause claim is not justiciable under traditional precedent. *See, New York v. United States*, 112 S.Ct. 2408, 2432-2433 (1992); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 706 (1962). To the extent the Guarantee Clause is recognized as the basis of enforceable rights, it may at best confer a right upon a state government or its subdivisions to sue to enforce the provisions of a federal statute. *New York v. United States, supra*, 112 S.Ct. at 2433; *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 2399-2401 (1991).

Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995), relied upon by Petitioners (Pet. for Cert. at 16), has no application, as it dealt with a federal separation of powers issue, not a state government issue.

There is no problem of federal constitutional dimension that has been delineated in the Petition, or that we can discern, with New York's statutory scheme for the review of school district elections. Despite the language of Education Law § 2037, judicial review of the decisions of the Commissioner of Education in school election cases has long been available, as reaffirmed by the Court of Appeals in this case. (Pet. for Cert. at A-4.)

Since this Court is bound by the interpretation and construction of a state constitution or statute that is given by the state's highest court (*Wisconsin v. Mitchell*, 113 S.Ct. 2194 [1993]; *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 [1992]; *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 [1991]), the Court is not free to construe § 2037 as precluding access to the New York Courts by a party aggrieved by actions of a board of education pertaining to a school district election. There is thus no danger that New York will lose "its ability to set [its] legislative agendas," or that New York's officials will not "remain accountable to the electorate." *New York v. United States, supra.*

Thus, even if timely presented to the state courts, the Guarantee Clause claim cannot stand.

POINT III.

THE PETITIONERS' CLAIMS, PURPORTEDLY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THAT THEY WERE DEPRIVED OF THEIR PROPERTY, INCLUDING THE FRUITS OF THEIR LABOR, WITHOUT DUE PROCESS, BY A SCHOOL DISTRICT'S DISSEMINATION AT TAXPAYER EXPENSE OF LITERATURE THAT ALLEGEDLY EXHORTED THE VOTERS TO APPROVE A BOND REFERENDUM, WERE PROPERLY DISMISSED BY THE STATE COURTS.

The Court of Appeals treated Petitioners' general due process claims as federally based (Pet. for Cert. at A-6), but whatever the merits of that holding with respect to the other governmental defendants, Fifth and Fourteenth Amendment claims were not adequately pleaded against the School District.

A. Petitioners' Vague Use of the Generic Term "Due Process" in Their State Court Pleadings was Insufficient to Raise a *Bona Fide* Federal Question.

It is well settled that in order for this Court to have jurisdiction to review a determination of a State's highest Court, "some provision of the Federal, as distinguished from the State, Constitution [must be] relied upon, and such provision must be set forth." *New York Central and H.R. Co. v. New York*, 186 U.S. 269, 273, 22 S.Ct. 916 (1902). Thus, if a petitioner claims that a State statute is "unconstitutional" or that it violates "due process," it will be assumed that reference is being made to the State

Constitution and rights thereunder rather than to the Federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68, 49 S.Ct. 61 (1928). This is especially true where, as here, the applicable State Constitution contains a due process clause. *Bowe v. Scott*, 233 U.S. 658, 664-65, 34 S.Ct. 769 (1914).

In the present case, Petitioners' entire federal constitutional claim (after the text of the Fifth Amendment is set out), is set forth in paragraph 195 of their initial pleading:

> It is a violation of plaintiffs' fundamental right as expressed in said Fifth Amendment for the Executive or Legislative branch of the State of New York, a county subdivision of the State of New York, or a school district subdivision of the State of New York to take money from plaintiffs-voters-citizens-residents-taxpayers in violation of the provisions of the State Constitution and its laws.

Petitioners did not adequately identify their claim against the School District as falling within the ambit of the federal, as contrasted with the state constitution. A legal conclusion without supporting reasoning is not sufficient to present an issue for careful consideration by the state courts, which must precede its consideration by this Court. However, even if such a claim was adequately identified, it was properly rejected by the state courts.

B. Petitioners' Fifth and Fourteenth Amendment Claims were Properly Rejected.

We have found no support for the proposition that a violation of a state constitutional provision against expenditure of public funds in aid of a private undertaking is automatically also a federal due process violation. And, as the court of original instance stated, the absence of a due process violation is quite apparent:

> Plaintiffs have had access to the court and an adequate opportunity to challenge on the merits, the actions of the defendants alleged to be in violation of Articles VII and VIII of the New York State Constitution. The requisites of due process have been satisfied.

(Pet. for Cert. at A-29–A-30.)

It is well established that federal due process claims must be based upon a specific infringement of the plaintiff's personal property rights. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). The principle of standing does not extend to a general challenge to the expenditure of tax funds. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 113 S.Ct. 2297 (1993); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037 (1989); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752 (1982); *Duke Power Company v. Carolina Environ-*

mental Study Group, 438 U.S. 59, 98 S.Ct. 2620 (1978); *U.S. v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940 (1974); *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405 (1973).

It clearly follows that an individual taxpayer cannot properly claim an infringement of his due process rights under Articles 5 and 14 of the Federal Constitution when the only specific injury sustained by him is a possible increase in taxes, and when redress for that injury is adequately provided by New York.

POINT IV.

PETITIONERS SCHULZ AND GRENCI LACK STANDING.

Petitioner Robert L. Schulz resides in Queensbury, New York; Petitioner Salvatore Grenci resides in West Islip, New York. Neither lives in, or is a taxpayer of the Commack Union Free School District. Thus, neither has standing to bring this Petition.

POINT V.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER SCHULZ IS UNAUTHORIZED TO APPEAR HEREIN EITHER AS AN ATTORNEY OR *PRO SE*.

Petitioner Schulz is not a resident or taxpayer of Commack and thus concededly lacks standing as a petitioner herein *(See*, Point IV, *supra)*. Since Schulz has no standing as a party, his signing the Petition can only be interpreted as his attempt to act as

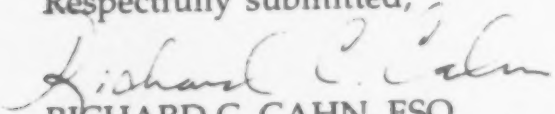
attorney-at-law for the two *pro se* plaintiffs who do reside in the district. His actions in thus "representing" the other named Petitioners are indistinguishable from the actions of an attorney at law, and we believe that he is in violation of the State criminal laws and the rules of the New York Courts relating to the practice of law by non-lawyers, and that by filing and signing the instant Petition for *Certiorari* he is also violating Rules 9.1 and 12.1 of this Court, which require appearance by counsel admitted to the Bar of this Court. The unauthorized presentation of the Petition by Schulz provides an additional reason for its denial.

CONCLUSION

Since the federal claims were not adequately presented to the New York courts, and in any event raise no issue that require resolution by this Court, the Petition for *Certiorari* should be denied.

Dated: Melville, New York
September 29, 1995

Respectfully submitted,



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